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No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

AMERICAN METHYL CORPORATION,
PETITIONER

v.

THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AMERICAN MOTORS CORPORATION, CHRYSLER CORPORATION, GENERAL MOTORS CORPORATION, VOLKSWAGEN OF AMERICA, INC., AND ENVIRONMENTAL PROTECTION AGENCY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Once a fuel or fuel additive has been waived into commerce, can its waiver be revoked and the fuel be excluded from commerce without first proceeding as required by § 211(c) of the Clean Air Act for the regulation and control of fuels in commerce?

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American Methyl Corporation (intervenor below)[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

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[1] American Methyl Corporation was formerly known as Anafuel Unlimited and is so referred to in the decision of the administrator of the Environmental Protection Agency.

OPINIONS BELOW

The opinion of the Court of Appeals (per Judge Wald) is reported at 768 F.2d 385, and appears as Appendix A. The decision of the administrator of the Environmental Protection Agency (EPA) was published at 46 Fed. Reg. 48975 (Oct. 5, 1981), and appears as Appendix C. Subsequent orders of the Court of Appeals denying a petition for rehearing and a suggestion that rehearing be en banc, entered September 18, 1985, are unreported, and appear as Appendices D and E.

JURISDICTION

The judgment of the Court of Appeals (App. B, infra) was entered on July 26, 1985. A timely petition for rehearing was denied on September 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The applicable statutory provisions are set forth in full in Appendix G, p. 58a. The pertinent parts of said statutes provide as follows:

Section 211(c)(1) of the Clean Air Act, 42 U.S.C. § 7545(c)(1) provides (Appendix G, p. 59a):

> (1) The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle or motor vehicle engine (A) if in the judgment of the Administrator any emission product of such fuel or fuel additive causes, or contributes, to air pollution which may reasonably be anticipated to endanger the public health or welfare, or (B) if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the

Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated.

Section 211(f)(4) of the Clean Air Act, 42 U.S.C. § 7545(f)(4) provides (Appendix G, p. 64a):

> (4) The Administrator, upon application of any manufacturer of any fuel or fuel additive, may waive the prohibitions established under paragraph (1) or (3) of this subsection or the limitation specified in paragraph (2) of this subsection, if he determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, and the emission products of such fuel or additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified pursuant to section 7525 of this title. If the Administrator has not acted to grant or deny an application under this

paragraph within one hundred and eighty days of receipt of such application, the waiver authorized by this paragraph shall be treated as granted.

STATEMENT

1. Before the 1977 amendments to the Clean Air Act, the EPA was authorized by regulation under § 211 (c)(1)[2] to control or prohibit the sale of a fuel or fuel additive already introduced into commerce if it was found to significantly impair emission control devices or systems.

The 1977 amendments to the Clean Air Act included new § 211(f) (Appendix, p. 63a) designed to prohibit the introduction of any new fuels or fuel additives other than those substantially similar to fuels used by manufacturers in certification testing of new vehicles under § 206 of the Act. Behind the enactment of § 211(f) was the concern of Congress that some new fuels, particularly one known as MMT, would reduce the effectiveness of existing emission control devices in cars and light-duty trucks before the EPA would be able to complete

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[2] 42 U.S.C. § 7545(c)(1). (Appendix, p. 59a.)

the administrative proceedings under § 211(c). See American Methyl Corp. v. E.P.A., 749 F.2d 826, 829 (D.C. Cir. 1984).

At the same time Congress wanted to avoid delaying unnecessarily the admission into commerce of new fuels that did not cause or contribute to the failure of vehicles to meet emission standards. To avoid unnecessary delays for introduction into commerce of such fuels, Congress added a new § 211(f)(4) pursuant to which new fuels would be automatically waived into commerce if the Administrator does not act to grant or deny a waiver application within 180 days of its receipt.

An example of a new fuel is methanol (methyl/alcohol) which is considered by many experts to be the most promising transportation fuel of the future. One of the chief advantages of this fuel is that it can be produced very efficiently from a wide range of domestic feedstocks including natural gas, refuse and coal. Methanol's chief current market is as a gasoline extender and octane enhancer. When used in place of petroleum-derived octane boosters, which are more expensive, more gasoline can be generated from a barrel of oil.

Petitioner, American Methyl Corporation, was one of the first companies to recognize the potential of methanol-gasoline blends. On February 20, 1981, American Methyl applied under § 211(f)(4) of the Clean Air Act for a waiver, which was granted September 28, 1981, for a fuel additive known as Petrocoal. American Methyl's expenditures in developing and marketing Petrocoal totaled nearly one million dollars. American Methyl Corp. v. E.P.A., supra, 749 F.2d at p. 829, fn. 13.

3. Shortly after the granting of the Petrocoal waiver, two attempts were made by the Motor Vehicle Manufacturers Association (MVMA), one unsuccessful and the other successful, to have Petrocoal eliminated from commerce. This petition stems from the conflicting treatment of those attempts by two different panels of the Court of Appeals for the District of Columbia Circuit.

The unsuccessful attempt to end the Petrocoal waiver was an MVMA effort to have the waiver revoked under § 211(f) of the Act. After the proceedings in the EPA, the Administrator proposed to revoke the Petrocoal waiver claiming an inherent power of revocation

under § 211(f) of the Act. American Methyl Corp. v. E.P.A., supra, 749 F.2d at pp. 829-830. American Methyl petitioned the Court of Appeals for review of the proposed revocation claiming that the Petrocoal sales which had been at a record high level before the EPA threatened to revoke the waiver, had virtually ceased within a matter of months. The loss of sales was attributed by American Methyl's president to the EPA's assertion of a right to revoke the waiver under § 211(f).

The Administrator took the position, among others, that he had inherent authority under § 211(f) to revoke the waiver of fuels already introduced into commerce but the Court of Appeals held otherwise in the light of (1) Congress' insistence that the EPA make a "careful albeit expeditious decision in the first instance" of waiving a fuel into commerce under § 211(f) and (2) the "Congressionally-mandated procedural safeguards" of § 211(c) for correcting mistakes once a fuel has been admitted into commerce under § 211(f).

Before the Administrator may "control or prohibit" under § 211(c) a fuel or fuel additive already introduced into commerce, he must, among other things, (1)

consider all pertinent scientific, medical, or economic data; (2) prepare a cost/benefit analysis (for regulation protecting emission controls); (3) formally declare that the fuel or fuel additive causes or contributes to harmful air pollution or would significantly impair the effective functioning of emission control systems; and (4) formally declare that regulation would not result in use of more dangerous additives. No such protections are found in § 211(f).

The Court of Appeals set aside the notice proposing revocation of the Petrocoal waiver after finding that "implied power to revoke waivers under § 211(f) of the Clean Air Act [was] contrary to the intention of Congress and the design of that statute * * *." American Methyl Corp. v. E.P.A., supra, 749 F.2d at p. 840.

The serious harm to the country from the existence of power to revoke existing waivers of fuel already in commerce without § 211(c) proceedings was described by the Court of Appeals in the following language (749 F.2d at 840):

Like the sword suspended by a hair above the

courtier Damocles, the Administrator's claimed revocation authority would pose an ever-present threat to the marketing of new fuels, fostering great uncertainty in the business community. Technologically-advanced fuels could be taken off the market at any time, and neither specified hearing procedures nor rules of repose would cabin the Administrator's discretion. This risk is hardly typical of commercial operations in a regulated economy. Moreover, because the manufacturer's product is assumed undeserving of waiver, the presumption is against the continued existence of his business even if his waiver is challenged with evidence gathered years after heavy capital investment—an extraordinary risk for a commercial entity to bear, as agency counsel conceded at oral argument.

Because a manufacturer could never know ex ante whether his product would be available for sale for a sufficient time to recoup his initial investment, he might well decide not to risk his capital in the first place. As a consequence, the public and this nation would suffer from lack of innovation in fuels and fuel

additives, to the ultimate detriment of air quality and our national security.

The American Methyl Corp. v. E.P.A. case was remanded to EPA for proceedings under § 211(c).

Before any of the proceedings required by § 211(c) had been conducted, MVMA's second effort to revoke the Petrocoal waiver—direct review of the original granting of the waiver by the Court of Appeals—came before another panel of the Court. The second panel, without the benefit of any proceedings having been conducted under § 211(c), proceeded to find that the Administrator's granting of the Petrocoal waiver was arbitrary, capricious and an abuse of discretion and vacated the waiver. The case was remanded for further proceedings for the possible grant of a new waiver for Petrocoal. It is from this second action of the Court of Appeals that this petition stems.

REASONS FOR GRANTING THE PETITION

1. THE DECISION BELOW WOULD READ OUT OF THE STATUTE THE SPECIFIC PROCEDURES SPECIFIED BY CONGRESS TO BE FOLLOWED FOR THE CONTROL OF FUELS ALREADY IN COMMERCE.

The decision of the Circuit Court, if permitted to stand, will remove all the substantive and procedural safeguards expressly provided by Congress in § 211(c) for the protection of the public and the manufacturers and sellers of fuel or fuel additives already introduced into commerce.

Congress provided a procedure to be followed by the EPA Administrator to waive the prohibitions which Congress had established making it "unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce" such fuel or fuel additive. Section 211(f)(4) of the Clean Air Act, 42 U.S.C. 7545(f)(4) grants the Administrator the right to waive the said prohibition against introducing certain fuels into commerce. In addition, said § 211(f)(4) provides that if no action is taken by the Administrator to grant or deny an application then the waiver made possible by said § 211 (f)(4) "shall be treated as granted."

In its wisdom, Congress did not exclude "waived" fuels from the already existing procedures to be followed for fuels already set forth in § 211(c) of the Clean Air Act, 42 U.S.C. 7545(c).

The procedures to control or prohibit such offending fuels are detailed and were intended by Congress to be followed to protect both the public and the manufacturers who had devoted substantial resources to producing the fuel or fuel additives pursuant to a waiver. The Senate Committee Report on the Clean Air Amendments of 1977 (p. 91) states (S.Rep. No. 127, 95th Cong., 1st Sess. 91 (1977) reprinted in 3 Legislative History, supra note 8, at 1371, 1465:

> "The Committee was mindful that the Administrator could choose not to act on the waiver application within the 180 days provided for such action. If the Administrator does fail to act under subsection (d) [now subsection (f)] to either grant, conditionally grant, or deny the waiver, it does not diminish the Administrator's power to act against the fuel or fuel additive through the application of the provisions of subsection (c) of this section.

The Court below determined that the actions of the Administrator were arbitrary, capricious and an abuse of discretion and then vacated the Administrator's decision and remanded the matter to the EPA to make a reasoned

decision as to whether to grant the waiver. There is no authority in the statute for such action for fuels already in commerce. If there was a mistake made authorizing a fuel to be introduced into commerce, then the matter must be remanded to the Agency for determination pursuant to § 211(c) which deals specifically with this very problem. Section 211(c) is a part of the Congressional Act and the Court below had no right to interpose its own procedure in preference to that specified by Congress. As this Court said in Chevron, U.S.A., Inc. v. Natural Resources Defense, 104 S.Ct. 2778, 2783 (1984):

> * * * If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress * * *.

2. THE PROCEDURE FOLLOWED BY THE COURT BELOW IN REVIEWING AN ADMINISTRATION DECISION CONFLICTS WITH THE PROCEDURES RECENTLY REITERATED AND DETAILED BY THIS COURT.

This Court in Motor Vehicle Mfrs. Ass'n v. State

Farm Mut., ____ U.S. ____, 103 S.Ct. 2856, 2870 (1983) reaffirmed its holding in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 98 S.Ct. 1197 (1978) as follows:

> * * * In Vermont Yankee, we held that a court may not impose additional procedural requirements upon an agency.

and also at p. 2871 said:

> * * * The agency must explain the evidence which is available, and must offer a "rational connection between the facts found and the choice made."* * *

The second panel of the Court of Appeals found a statement in an Appendix to the Petrocoal Waiver granted by the EPA which discusses a "statistical deteriorated Emissions Test" utilized by the EPA (46 Fed. Reg. at 48,978, 48,979, Appendix C, pp. 53a, 54a). The Administrator states that "Petrocoal just fails (by one vehicle) this Test for NO_2." The panel then concludes that the EPA has established specific statistical criteria for determining whether a fuel will cause a vehicle to exceed emission standards.

In fact, the EPA does not have any specific standards or procedures established for review of such waivers. The EPA has several tests which it employs in accordance with the authority granted the EPA by Congress to determine whether or not to waive the prohibitions against introduction of any fuel or fuel additive into commerce. It is assumed that the EPA has not established nor published any specific standards or procedures because of the various methods which may be used. As the Administrator said in its grant of the Petrocoal Waiver (Appendix C, p. 44a):

> An alternative to providing the amount of data necessary to meet the statistical requirements, is to make judgments based upon a reasonable theory * * *.

This Court in the State Farm Mut. case, supra, at p. 2866, recognized that:

> "regulatory agencies do not establish rules of conduct to last forever" * * * and that an agency must be given ample latitude to "adapt their rules and policies to the demands of changing circumstances."

The second panel of the Court of Appeals did not follow the dictates of this Court regarding the scope of judicial review of administrative decisions.

The Administrator's waiver grant demonstrated the fact that the Agency did adapt its rules and policies to the demands of changing circumstance and did consider all of the information provided and did make an informed judgment from those facts. The second panel of the Court of Appeals nevertheless concluded that the Administrator acted arbitrarily, capriciously and abused her discretion in direct contradiction of the guidelines set forth by this Court in Motor Vehicle Mfrs. Ass'n v. State Farm Mut., supra, at p. 2867, as follows:

> * * * Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. * * * We will, however, "uphold a decision

of less than ideal clarity if the agency's path may reasonably be discerned."

In this case the agency's path is easily discerned and is neither arbitrary nor capricious based upon all of the factors specified as grounds for finding that the Agency's action was arbitrary or capricious.

3. THE ACTIONS OF THE TWO PANELS OF THE COURT OF APPEALS ARE IN DIRECT CONFLICT.

The first panel of the Court of appeals in American Methyl Corp. v. E.P.A., 749 F.2d 826 (1984) decided basically the same issues that were decided in this case for which certiorari is sought. The said case involved all of the parties to this case and no others.

The issues in the proceeding decided in 1984 included a consideration of whether a grant of waiver could be revoked by the granting agency and whether there were any grounds for revocation.

The court in the 1984 decision determined that the record could not be remanded for possible revocation because § 211(c) of the Clean Air Act is the "exclusive" means by which the Administrator was to correct waivers mistakenly granted by default and (749 F.2d at p. 836):

> * * * What suffices to correct waivers mistakenly granted by default should also suffice to correct the (hopefully) far smaller proportion of waivers mistakenly granted after careful consideration.

The court in the 1984 decision also considered the reasons proposed as grounds for revocation and found that there were three reasons stated. One of these was based on new evidence presented to the Agency after the Agency issued a notice in the Federal Register on May 2, 1983, proposing to revoke the waiver and the other two were "make-weights by EPA's own admission" (749 F.2d at p. 837) and were "red herrings" (749 F.2d at p. 838).

> The court concluded that any "implied power to revoke waivers under Section 211(f) of the Clean Air Act [is] contrary to the intention of Congress and the design of that statute." (749 F.2d at p. 840).

The said court then remanded that case for further proceedings under § 211(c), if the Administrator deems them desirable. The said remand was not appealed, is a final determination, is in accordance with the statutory scheme and is in direct conflict with the determination in the instant case. Said determination being that the

remedy for issuance of an erroneous waiver is vacation by judicial action and not remand for consideration pursuant to the § 211(c) mechanism provided by Congress for rectifying mistaken actions.

This case is one of first impression in this Court, is of extreme importance to all parties who are now attempting to provide alternative sources of fuel or may be willing to invest in such a venture in the future. The court in the 1984 decision summarized the situation as follows (749 F.2d at pp. 839-840):

> By upholding Congress's disinclination to grant EPA un unguided and open-ended power to revoke waivers, we ensure that entities subject to regulation under section 211 know what is expected of them. Protecting the legitimate expectations of fuel manufacturers comports with basic fairness; it also encourages investment in technology to create more efficient, less costly, and less polluting substitutes for conventional fuels.
>
> Because a manufacturer could never know ex ante whether his product would be available for sale for a sufficient time to recoup his initial investment, he

might well decide not to risk his capital in the first place. As a consequence, the public and this nation would suffer from lack of innovation in fuels and fuel additives, to the ultimate detriment of air quality and our national security.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1985